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IN THE

Supreme Court of the United States

October Term, 1983

SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC., NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC.

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On June 13, 1983 the United States Court of Appeals for the Second Circuit affirmed a decision of the Interstate Commerce Commission (ICC) which gave the nation's motor carriers and freight forwarders a new way to limit their liability for loss or damage to goods. For the first time, carriers would be authorized to use a "deductible" as a device to eleminate their obligation to pay damages up to a stated amount, even though the damages were due to a carrier's negligence.

The impact of this decision is extremely serious, not only to large corporations which ship millions of shipments annually by truck, but to shopkeepers, homeowners and consumers whose goods and household items are lost or damaged in transit. Because some amount of liability is avoided whenever there is loss or damage under a deductibles provision, and all liability may be avoided in many cases, the Commission's new interpretation of the law will lead to a massive transfer to shippers of the burden of loss or damage due to carrier negligence. Rarely has a case of such broad and recurrent commercial importance demanded the attention of this Court.

At issue in this case are the proper interpretation of the Interstate Commerce Act and the common law; the court of appeals' misconception of the difference between a "deductible" and a "released rate"; and the power of the ICC to legislate in an area reserved to Congress, namely, limiting the common law liability of carriers.

To determine whether the Court of Appeals erred in upholding the ICC's decision authorizing motor carriers to use deductibles we must ask the following questions:

1. Did the decision contravene the clear wording of the Interstate Commerce Act.
2. Do deductibles violate the common law by allowing carriers to improperly evade their liability for loss or damage to goods entrusted to them for shipment?
3. Is a deductible the same as a released value provision, i.e., a statutory agreement "to limit liability and recovery to an amount not exceeding the value declared or released"?
4. Did the Commission exceed its authority by attempting to legislate in an area reserved to Congress?
5. Did the Commission's decision have a rational basis?

LIST OF PARTIES

Petitioners here, Shippers National Freight Claim Council, Inc., National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc., were the petitioners in the court whose judgment is sought to be reviewed. They have no parents, subsidiaries or affiliates.

Respondents below were the Interstate Commerce Commission and the United States. American Trucking Associations, Inc. intervened as a respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Shippers National Freight Claim Council, Inc., the National Small Shipments Traffic Conference, Inc. and the Drug and Toilet Preparation Traffic Conference, Inc. (hereinafter Petitioners, or Shipper Conferences) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported as *Shippers National Freight Claim Council, Inc. v. ICC*, 712 F.2d 740 (2d. Cir. 1983), and is attached hereto as Appendix A. The relevant decisions of the ICC were issued in two separate dockets. In three unpublished decisions served May 20, 1980 (Appendix B), August 18, 1980 (Appendix C), and October 3, 1980 (Appendix D), each docketed as Released Rates Decision No. FF-303, *Interstate International, Inc., Used Household Goods*, the ICC approved a freight forwarder's request to establish a deductible provision for shipments of household goods. The Commission subsequently issued a broader decision approving deductibles provisions generally, for all motor common carriers, including household goods carriers and freight forwarders, in Docket No. 38752, *Petition for Declaratory Order on Deductibles in Household Goods Released Rates*, unpublished decision served March 23, 1982 (attached hereto as Appendix E).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A timely petition for rehearing was denied by order entered December 12, 1983 (Appendix F). This Court has jurisdiction to review the decision of the court below under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was properly invoked under 28 U.S.C. § 2342.

STATUTES INVOLVED

This case involves Section 10730 of the Interstate Commerce Act (49 U.S.C. § 10730), and its pedecessor, 49 U.S.C. § 20(11). Both sections are reproduced in Appendix G.

STATEMENT OF THE CASE

This case had its inception in the petition of Interstate International, a freight forwarder transporting used household goods, for approval by the ICC of a novel released value arrangement under which shippers would be offered a choice of one of three released values for their goods. As pertinent here, the released value would be based on units of volume rather than weight. Two of the three released values were also accompanied by *deductible* provisions, under which the carrier would have no liability for the first $25 or $50 of loss or damage per 400 cubic feet shipped.

Although no rates were proposed in the petition, a household goods shipper at the lowest liability option ($1,600 released value and $50 deductible per unit of 400 cubic feet shipped) would presumably pay the lowest transportation rate. In the event of loss or damage, the first $50 would always be borne by the shipper, even though the loss or damage was caused by the carrier's negligence. Above the $50 deductible, the shipper could receive compensation for loss or damage up to a maximum of $1600.

A released value, regardless of whether it is based on volume or weight *(e.g.,* $2.00 per cubic foot or $2.00 per pound), establishes a value limit on the carrier's exposure to liability, based on a value for the property which is agreed to by the shipper. If loss or damage does not exceed the amount agreed as the value of the shipment, the shipper will by fully compensated; if the actual loss or damage exceeds the limit, the shipper will still receive the released value as partial compensation. In contrast, a deductible is an amount which the carrier will never pay, regardless of the loss or

damage he may cause to the shipper's goods. Under a released value, the carrier has no liability only if there is no damage to the shipper's property. By setting a high enough deductible, a carrier would be able to escape virtually all liability for damage or loss to goods in its custody.[1]

Because the Commission's public notice of Interstate International's application did not mention the unprecedented deductible provisions, no statements in opposition were filed and the Commission's Released Rates Board issued a decision approving the application. (Appendix B.) These Shipper Conferences then sought Commission review of the Board's decision. A Division of the ICC affirmed the decision of the Board (Appendix C). Further administrative review was sought but denied (Appendix D) and these Shipper Conferences sought judicial review in the Second Circuit pursuant to 28 U.S.C. § 2342.

The proceeding in the court of appeals was held in abeyance to permit these Conferences to seek a declaratory order from the Commission on the issue of deductibles

[1]It is important to note that the law allowing deductibles in insurance policies is no precedent for the use of deductibles in the carrier/shipper relationship. The carrier's liability derives from the common law of negligence and the responsibility of a bailee to the bailor. The insurer, on the other hand, agrees to pay for all or part of the consequences of another's negligence. Moreover, a carrier has sole possession of the goods entrusted to its care. Unlike a shipper of goods, a homeowner or auto owner retains possession and control over the owned property. A deductible in a homeowner's policy or auto policy provides an incentive to the owner in possession of the property to prevent loss or damage. Allowing carriers to establish deductibles for their liability creates a disincentive for them to protect and handle the goods carefully. It is contrary to public policy to create a class of persons (here, carriers) who can disclaim liability for their own negligence.

(Appendix E). In that order, the Commission said there was no legitimate reason to distinguish between released rates and deductibles, and for that reason held that 49 U.S.C. § 10730 permits the use of deductible provisions by motor common carriers of household goods, by other motor common carriers and freight forwarders, and by railroads. The court of appeals denied the petition of these Shipper Conferences for review of the Commission's decisions, with a dissenting opinion by Judge Pratt.

REASONS FOR GRANTING THE WRIT

Section 10730 of the Interstate Commerce Act authorizes a limitation on full liability for loss and damage in instances where the shipper and carrier reach an agreement on a released "value" of the shipment. There is no specific statutory provision allowing deductibles for motor carriers and freight forwarders. The court of appeals and the Commission base their conclusion that this statute authorizes deductibles on the misconception that deductibles are not distinguishable, in fact or in law, from released values. In refusing to recognize this distinction, they ignore the history of the common law of carrier liability for loss and damage and fail to consider the profound practical consequences of allowing deductibles.

The court and Commission find support for allowing motor carrier deductibles in 1980 amendments to Section 10730. Congress did change the law in 1980 to permit railroads to offer deductibles in addition to released value provisions. However, no such change was made in the law governing motor carriers. The normal inference from the 1980 amendments is, therefore, just the opposite of that drawn by the Commission and the court of appeals.

I. Deductibles Were Not Permitted At Common Law

The law of freight loss and damage, as codified in the Interstate Commerce Act, has its roots in the common law. Although the ICC did not go so far, the majority in the court of appeals concludes that deductible provisions were permissible even at common law. This conclusion leads the court to find that the ICC's approval of deductibles was not in derogation of the common law liability of common carriers. The court's analysis, which would allow carriers to

transfer the consequences of their own negligence to innocent householders and other shippers, cannot withstand scrutiny.

The common law rule was that a carrier, though not an absolute insurer, was liable for loss or damage to goods transported by it unless it could affirmatively show that the loss or damage was attributable to the act of God, the public enemy, the act of the shipper, public authority or the inherent vice or nature of the goods. *Missouri Pacific Railroad v. Elmore & Stahl,* 377 U.S. 134 (1964). Moreover, a carrier could not exempt itself from liability for the consequences of its own negligence or misconduct, so even if the damage resulted from one of the causes enumerated above, the carrier could be held liable for its negligent failure to prevent or minimize such damage. See *Bills of Lading,* 52 ICC 671, 679 (1919). The measure of damages was the shipper's full actual loss, and attempts to evade full carrier liability were unenforceable as contrary to public policy.

There was one judicially-recognized exception to this rule of full carrier liability. That exception allowed a carrier and shipper to negotiate a *maximum* value of the shipment, which operated to limit carrier liability. The shipper was given a choice of two rates, one of which provided full liability and the other a lower rate for shipments on which carrier liability was limited to the agreed value. Such shipments were said to be "released" by the shipper to the value stated in the contract of carriage. If a loss exceeded the released value, the shipper would be estopped from claiming the excess because of the stipulation as to the maximum value of the shipment. *Hart v. Pennsylvania Railroad,* 112 U.S. 331 (1884).

The court of appeals recognized these principles (Appendix A at 11-12) but failed to reach the conclusion that

necessarily follows therefrom: since deductible provisions exempt a carrier from a stated amount of loss or damage regardless of the cause, they allow a carrier to do just what it could not do at common law, *viz.*, completely escape the consequences of its own negligence or misconduct for shipments it loses or damages where the amount of the loss is less than the deductible. Deductibles are thus antithetical to the common law rule of carrier liability.

No common law cases support limitations of carrier liability through the use of deductibles; yet the majority attempts to support the view that deductibles would have been permitted at common law by reference to a statement in *Hart, supra,* to the effect that any limitation of carrier liability must be reasonable. Since the majority regards deductibles as reasonable, it concludes that the *Hart* test would have been met by deductibles.

Not only is this a classic example of circular reasoning, but the majority's conclusion is incompatible with its own explanation of the rationale of the *Hart* decision. The majority explains that the carrier was "entitled to know the extent of its potential liability" and to be compensated accordingly.

> "Hence the contractual limitation on the carrier's liability was viewed not as the carrier's attempt to exonerate itself from losses negligently caused by it, but rather as the agreement of carrier and shipper in advance on the *maximum* compensation the shipper would recover should the property be lost or damaged, with the freight rate keyed to the size of the carrier's risk." (Appendix A at 12, emphasis added.)

This is an accurate statement of the rationale for upholding released value agreements. But this rationale is completely inapplicable to deductible provisions. A deductible tells the carrier *nothing* about the "extent of the carrier's potential liability", or the "maximum compensation the shipper would recover". Without a released value provision, there would be no limit to a carrier's potential liability, regardless of whether there was a deductible in force or not.

The only thing that released values and deductibles have in common is that they are both limitations on liability. A released value is stated in terms of the agreed value of the shipment (the same term used in Section 10730). The deductible does not limit the value of the shipment; and its operation is the same regardless of whether a shipment has a value of $100 or $10,000. As to two shipments with widely disparate values, its function is the same: it provides a disclaimer of liability in the same amount (*e.g.*,$50 per shipment) for both shipments.

The court of appeals quotes at some length from *Hart*, implying that the words quoted somehow support approval of deductibles. In fact, the quoted paragraph clearly referred to released value provisions, not to deductibles. Judge Pratt parsed that paragraph to telling effect in his dissent. His analysis (Appendix A at 36) is reproduced below:

Released Value (As described in *Hart*, 112 U.S. at 340-41 [5 S. Ct. at 155-56].)	**Deductible**
"The limitation as to value has no tendency to exempt from liability for negligence."	A deductible is designed to exempt from liability for negligence.
"It does not induce want of care."	A deductible does induce want of care and even petty theft.
"It exacts from the carrier the measure of care due to the value agreed on."	A deductible exacts from the carrier no care up to the deductible amount.
"The carrier is bound to respond to that value for negligence."	Below the deductible value the carrier is exempt from its negligence.
"The compensation for carriage is based on that value."	The compensation for carriage is not directly related to the amount of a deductible.
"The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties in that contract."	A deductible is unrelated to the value of the articles.
"The carrier must respond for negligence up to that value."	The carrier is exempt from liability up to the deductible amount.

We know of no common law case in which a limitation of

carrier liability based on a deductible was permitted. Given the above-noted differences between released value provisions and deductibles, it is easy to see why only the former, and not the latter, were accepted by the courts.

II. Deductibles Were Not Permitted Under The Interstate Commerce Act Prior To 1980

The original 1887 Act to Regulate Commerce did not address the matter of carrier liability for loss and damage, and no responsibilities were given to the Commission. (Even to this day, the Commission has no jurisdiction to award damages on shippers' loss and damage claims.) It soon became apparent, however, that Congressional action was needed to resolve the conflicting views on carrier liability that were produced by the various states' interpretations of the common law.

Congress addressed the issue on three occasions in the early years of this century.[2] Congress' first attempt to regulate carrier liability for loss and damage on interstate shipments came in the Carmack Amendment of 1906, which voided any contract, receipt, rule or regulation purporting to exempt a carrier from full liability for loss or damage. In 1913, in *Adams Express Co. v. Croninger*, 226 U.S. 491, the Court held that the Carmack Amendment did not prohibit released value agreements. Following *Hart, supra*, the Court concluded that such agreements did not constitute exoneration from liability for negligence, but merely set a value on the goods to alert the carrier to his *maximum* exposure to liability and the level of care called for. Carriers would remain fully liable for negligence up to that value (which would not be true of a deductible).

The rule of *Croninger* nevertheless led to abuses by carriers, which published rates based on agreed values and

[2] *Bills of Lading, supra*, 52 ICC at 679-85, provides a good capsule history of developments in the law in these early years.

prohibitively high rates based on actual value. *Loss and Damage Claims*, 340 ICC 515, 521 (1972). Congress responded in 1915 with the first Cummins Amendment, which restored the rule of full carrier liability by declaring unlawful and void "any limitations of liability or limitation of the amount of recovery or representation or agreement as to the value" of the goods transported. Even under this stringent rule, however, the principle of estoppel of shippers against repudiation of declared values for packaged goods was preserved in a proviso. See *Bills of Lading, supra,* 52 ICC at 683.

The first Cummins Amendment failed to satisfy the need for clear rules on carrier limitations of liability. Congress finally decided, in the second Cummins Amendment, enacted in 1916, to permit released value agreements as the sole exception to the rule of full carrier liability, but subjected them to prior Commission approval. The words of the second Cummins Amendment were codified as 49 U.S.C. § 20(11) (See Appendix G), and remained essentially unchanged between 1916 and 1978, when the Interstate Commerce Act was recodified and the provisions of Section 20(11) were incorporated (without substantive change) into 49 U.S.C. § 11707 and 49 U.S.C. § 10730.

Section 20(11) was unambiguous on carrier limitations of liabilty:

> [N]o contract, receipt, rule, regulation, or other limitation *of any character whatsoever,* shall exempt such common carrier...from the liability imposed...and any such limitation, *without respect to the manner or form in which it is sought to be made* is declared to be *unlawful and void.*

The sole exception was where the Commission had authorized:

> rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the *released value* of the property, in which case such declaration or agreement shall have no other effect than to *limit liability and recovery to an amount not exceeding the value so declared or released.*

The foregoing language is important for several reasons. The statutory language cannot be made compatible with the use of deductible provisions. Aside from the fact that deductibles are not agreed values,[3] there is simply no way that a deductible provision can operate so as to have "no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released."

The language of Section 20(11) also disposes of the majority's contention that "there is no difference, in principle, between a deductible, which establishes a floor figure for a shipper's recovery, and an arrangement which sets a ceiling" (Appendix A at 18-19). We hestitate to equate floors and ceilings, even in principle, but there can be no doubt that what Congress contemplated in Section 20(11) was precisely a "ceiling", and not a "floor". Only a ceiling, or a released value agreement, achieves the goal of alerting the carrier to its maximum exposure to liability; only a ceiling, or a released value agreement, can serve to "limit liability and recovery to an amount not exceeding the value so declared or released."

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[3]Deductibles have nothing to do with the value of the goods. They provide that if a loss occurs to any shipment, regardless of its value, the carrier can deduct the stated amount from its claim payment.

The majority makes much of the absence of an express prohibition against deductibles, but this is hardly controlling. It is difficult to imagine a better case for the application of the maxim *expressio unius est exclusio alterius* than this one, where not only is a single type of limitation of liability with characteristics unique to released value agreements specified in the statute, but all others "of any character whatsoever" are condemned.

The majority also dismisses lightly the fact that, at least since 1916, deductibles were never approved in any case before this one, by saying there is no evidence that any carrier ever sought to use them (Appendix A at 18). However, it is easy to understand why, in the face of the statutory language quoted above, as well as the common law prohibition against exemption from liability for negligence,[4] no carrier even attempted to publish a deductible prior to 1980.

As for the majority's contention that the Commission has broad discretion in this area, the cited cases establish only that the Commision has discretion with respect to released value agreements. It has no authority to change the law controlling common carrier limitations of liability.

III. The 1980 Amendments To The Act Do Not Permit Deductibles For Motor Carriers

In the Interstate Commerce Act as recodified in 1978, Section 11707(c)(1) prohibits attempts by common carriers to exempt themselves from or limit their liability. The Section provides that

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[4]The common law cases remained significant even under the Interstate Commerce Act, because Section 20(11) was regarded as a codification of the common law rule. See *Loss and Damage Claims, supra,* 340 ICC at 522.

> A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule or tariff filed with the Commission in violation of this section is void.

The only exception to this prohibition is provided by 49 U.S.C. § 10730. Prior to the 1980 amendments, Section 10730 of the Act permitted the Commission to

> "require or authorize a carrier... to establish rates... under which the liability of the carrier... is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation."

It is clear from the fact that this language is a recodification without substantive change of Section 20(11), and from the language used, that Section 10730, like Section 20(11) and the common law which Section 20(11) embodied, continued to contemplate released *value* provisions which set a reasonable upper limit to carrier liability. With a deductible, however, liability cannot be "limited to the value established" by the shipper, as required by the statute.

Congress enacted three major pieces of transportation legislation in 1980: The Motor Carrier Act of 1980,[5] The

[5]Publ. L. No. 96-296, 94 Stat. 793 (July 1, 1980).

Staggers Rail Act of 1980[6] and the Household Goods Transportation Act of 1980.[7] As a result of the 1980 amendments, Section 10730 was divided into the three subsections it contains today. The Staggers Rail Act of 1980, which led to Section 10730(c) dealing with rail carriers, preserved the language quoted above, but added new language expressly permitting deductibles in rail carrier released value provisions.

The Motor Carrier Act of 1980, which led to Section 10730(b) dealing with motor carriers of commodities other than household goods, also preserved the language quoted above, but did *not* add the new deductibles authority provided to railroads in the Staggers Act. The only change made in Section 10730 by the Motor Carrier Act was to allow motor carriers to file tariffs containing released value provisions without prior Commission approval.

Section 10730(a), which was made to apply only to motor carriers of household goods and other carriers (such as freight forwarders) not covered by subsections (b) and (c), was left unchanged by the 1980 amendments. The language quoted above was preserved, as was the need for advance Commission approval of released value provisions. Deductibles are not permitted under subsection (a) of Section 10730.

The belief of the majority that deductibles were lawful between 1916 and 1980 under the Interstate Commerce Act, and before that under the common law, gives rise to new difficulties when we come to the 1980 amendments. Aside from the problems addressed in the other sections of this Petition, the new amendments raise two obvious questions. First, if deductibles were already lawful, why did Congress consider it necessary to add new language to Section

[6]Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 14, 1980).

[7]Pub. L. No. 96-454, 94 Stat. 2011 (Oct. 15, 1980).

10730(c), expressly allowing railroads to use deductibles? Second, if Congress intended carriers other than railroads also to use deductibles, why didn't it say so in Sections 10730(a) and (b)?

In its most strained passage, the court of appeals goes to great lengths to provide answers to these questions, supplying arguments and analyses that are absent from the Commission's discussions of Section 10730. Ultimately the majority joins the Commission in arguing that Section 10730(a) and (b) do not expressly prohibit deductibles for motor carriers of household goods and other commodities, and in citing *American Trucking Ass'ns. v. Atchison T. & S.F. Railroad,* 387 U.S. 397, 411 (1967) for the proposition that a "particular authorization" in one section of the Act will not support a "pervasive prohibition" in others (Appendix A at 20 and 25).

The analogy between this case and *American Trucking Ass'ns.* is totally inapt. In that case, the statute authorized voluntary rail-truck arrangements on through routes and joint rates, but did not give the Commission power to compel such arrangements. The Court properly rejected the railroads' attempt to infer from this the absence of *any* authority in the Commission to regulate rail-truck intermodal service.

Here, in contrast, the question is whether Congress' 1980 amendment of one subsection of Section 10730 should be interpreted as extending the same privilege to carriers covered by other subsections of the same Section, which were in fact amended in 1980, but which did not authorize the use of deductibles. Congress expressly enacted Section 10730(c) to give *railroads* the right to use deductibles – a limitation of liability which would otherwise have been

prohibited by statute and common law. Congress did not give any other carriers this privilege. There can be only one proper construction.

Congress had three opportunities in 1980 to say what the majority now says it meant, and on each occasion it did not do so. Surely the maxim *"expressio unius"*, and other rules of construction, lead inexorably to the conclusion that Congress did not intend to permit motor carriers to use deductibles. Ordinarily, it will not be presumed that Congress intended to overturn long established law. When it does so, as it did for railroads, the statute is to be construed strictly. And, as this Court said in *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980):

> Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.

The decision of the court of appeals below conflicts in principle with the recent decision of the Fifth Circuit in *Global Van Lines v. ICC*, 714 F.2d 1290 (5th Cir. 1983). In that case the court reversed the Commission's attempt to extend to freight forwarders the benefits of simplified procedures for removing commodity and geographic restrictions from certificates of authority that Congress provided only for motor carriers. The court rejected the Commission's expansive reading of the Motor Carrier Act of 1980, as well as its assertion that it had authority under its general rulemaking authority to extend to all modes

whatever Congress expressly provided for carriers of any mode.[8]

What the Commission and the majority overlook is that the differences between the household goods carrier, motor carrier and railroad subsections of Section 10730 proceeded directly from the different concerns addressed by Congress in the Staggers Rail Act, Motor Carrier Act and Household Goods Transportation Act. The Staggers Act was a "railroad relief act", designed to relieve the ailing rail industry from the shackles of regulation. H. Conf. Rep. No. 96-1430, 96th Cong. 2d Sess. 80, reprinted in 1980 U.S. Code Cong. & Ad. News 4110, 4111.

In constrast to the railroads, the motor carrier industry was seen as healthy and strong. While some deregulatory measures were incorporated into the Motor Carrier Act of

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[8]See also *Flint v. Christall*, 117 U.S. 187, (1898) in which the Court held that:

(1) Congress could make a change in the common carrier standard of care,

(2) The Congressional act which gave ship owners the right to a general average contribution from the cargo was a declaration of public policy, and

(3) If Congress had intended to grant any further privileges it would have expressed such intention in unmistakable terms.

As the court observed, "It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the ship owner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew."

1980 (and, as has been seen, into Section 10730(b)), Congress was also determined to rein in what it saw as a Commission bent on deregulating without regard to statutory constraints. Thus, Section 3 of the Motor Carrier Act of 1980 stated in part:

> ...that in order to reduce the uncertainty felt by the Nation's transportation industry, the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress; and that legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

This same theme appears in the legislative history of the Motor Carrier Act. See H.R. Rep. 1069, 96th Congress, 2d Sess., June 3, 1980, at pp. 10-11:

> In revising the statute, Congress also intends to give the Interstate Commerce Commission explicit direction for the regulation of the motor carrier industry and to ease that industry's uncertainty about the future of regulation by the Commission. The Commission is admonished to stay within the powers specifically vested in it by the revised law.

In drafting the Household Goods Act Congress perceived, quite accurately, that the typical shipper is a householder who moves once or twice in a lifetime and has neither the sophistication nor the bargaining power to stand on equal footing with the motor carrier. Thus, the Household Goods Transportation Act was designed to maintain or strengthen the position of the shippers. H. Rep. No. 96-1372, 96th Cong. 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Ad. News 4271, 4275. In doing so, Congress elected to retain for them the full loss and damage protections and prior Commission approval of released rates as they had existed in Section 10730 prior to 1980. Section 10730(a) does not include for such carriers the special privilege of deductibles specifically legislated for railroads in Section 10730(c). Viewed against this background, the plain language of Section 10730, in particular the differences between subparagraphs (a), (b) and (c), cannot be ignored.

The Commission's actions in this case reflect its deregulatory zeal. However, the statute must remain controlling, and, as this Court observed in *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co.*, ____ U.S. ____, 103 S.Ct. 2856, 2866 (1983): "the forces of change do not always or necessarily point in the direction of deregulation." The Commission is not implementing the statute; it is attempting to rewrite the common law. The court of appeals failed to see this and its error is fatal.

IV. The Use of Deductibles Has Not Been Justified

Neither the Commission or the Court of Appeals has given any rational justification for the use of deductibles by motor carriers or freight forwarders. Traditionally, released

value limitations in contracts of carriage have been looked upon skeptically, but allowed, by the courts and the Interstate Commerce Act. Strict adherence to notice requirements, choice of rates, tariff compliance and reasonableness have been required. As the court said in *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 135 (4th Cir. 1967):

> [A]rrangements limiting liability contravene a strong public policy expressed in the common law, come within a carefully defined exception to the general thrust of Section 20(11) of the Interstate Commerce Act placing on the carrier absolute liability for damage, and are in operation attended by characteristics of an adhesion contract.

Deductibles have, therefore, never been allowed in common carrier contracts of carriage, and there are excellent reasons of public policy – the statutory prohibition aside -- for refusing to authorize their use today.

In practice, a released value or maximum limitation on carrier liability can serve to benefit both carrier and shipper. The carrier who receives a package or a sealed container or trailer cannot always know its contents or its value. If the shipper wants unlimited liability the carrier can charge a higher rate for the unknown risk; if the shipper is willing to declare or release the shipment to some maximum value, the carrier can charge a lower rate. Similarly, experienced shippers may know that total losses are rare and may wish to release their shipments to less than the full value in order to enjoy a lower freight rate.

The public interest is not disserved by the use of released values, or maximum limits on liability, since they do not

remove the carrier's incentive to prevent loss or damage. Indeed, the contrary is true because the carrier knows it will be 100% liable for all loss or damage up to the released value of the shipment. The carrier pays no compensation only where there is no loss or damage. The deductible, on the other hand, encourages careless handling and minor theft. It increases the "moral risk" because the carrier (and its employees and others who have access to the shipment in transit) know that no action can be taken by the shipper on the first $100 (or other deductible amount) of loss or damage. Thus, millions of thefts and carrier-caused damages will go uncompensated unless this Court reverses the court of appeals' misreading of a statute which is clear on its face. As Judge Pratt said in his dissent below, deductibles are, in effect, a "license to steal". (Appendix A at 26)

The majority of the court of appeals attempts to equate deductibles and released values by saying that the former involves "the first X dollars" of loss and the latter the "last Y dollars". (Appendix A at 14)[9] The absurdity of this comparison is obvious when examined. The released value agreement embodies the public policy requirements that carriers not be exonerated for their negligence, but that in rendering due care and assuming responsibility for freight, a carrier is entitled to rely upon the shipper's representation as to its value. The carrier must pay for all losses *up to* the released value. The inducement for careful handling and protection of goods is retained because the carrier will always be required to pay an amount up to the released value.

[9]Of course, in the application approved by the Commission below, the freight forwarder published deductible provisions in *addition* to released value provisions. Under such an arrangement the shipper foregoes the first X dollars *and* the last Y dollars of the loss.

The deductible, however, usually results in a carrier's *complete* exoneration for its negligence because the great majority of losses will fall below the deductible. Contrary to public policy, the inducement for careful handling and protection of goods is largely removed. The temptation on the part of truck drivers and freight handlers to "appropriate" goods to their own use, up to the amount of the deductible, will be overwhelming.

The enormous impact the deductible principle will have upon the nation's shippers, consumers and homeowners, if the court of appeals' decision is not reversed by this Court, can be demonstrated by visualizing a typical household goods movement. The carrier's driver and/or helpers usually pack the shippers' goods and carry them to the moving van. Thus, the driver/packer knows which carton contains the family treasures. The deductible maintained by the carrier and advertised on the bill of lading can serve as an open invitation to pilfer that portion of the shipment having a value less than the deductible without fear of responding in damages, as no claim can be filed for that amount.

The magnitude of the adverse affect this principle will have upon unrecoverable transit losses from motor freight shipments is obvious. No such problem with railroad deductibles was contemplated by Congress because rail cars are loaded and sealed by shippers and unloaded by consignees, not railroad workers. But the same conditions do not allow the use of deductibles by motor carriers whose employees and drivers physically handle household furniture for homeowners and packages for freight shippers. The average loss and damage claim on motor carrier shipments is approximately $100[10] Under the Commission's

[10] In *Loss and Damage Claims, supra*, 340 ICC at 526 the Commission found that the average claim for loss or damage to cargo was $100.

decision, as affirmed by the court of appeals, a motor carrier such as United Parcel Service could publish a $100 deductible and virtually free itself from any obligation of duty or care. And carrier employees would find it difficult to resist temptation in such an environment.

The widespread use of $100 deductible provisions by the motor carrier industry would revolutionize the transportation industry, bringing about a virtually complete transfer of the risk of loss in transit from carriers to shippers. If the decision of the Commission is allowed to stand, such a transfer is almost a certainty. Deductibles would offer an irresistible exit from liability for most carriers.

In view of these considerations, it was incumbent on the Commission to explain not just why it thought deductibles are lawful, but also why it thought they are desirable. Statutory considerations aside, what policy considerations led the Commission to depart from 64 years of precedent to allow motor carriers to limit their liability through deductibles?

Nowhere does the Commission's decision address any of these concerns. It neither discusses any gains achieved through the use of deductibles nor compares what is gained with the loss in protection suffered by shippers. The Commission's declaratory order contains only a brief reference to the (unspecified) benefits of increased flexibility for carriers to price their services. If there are benefits for shippers in the carriers' new "flexibility" to disclaim liability, they are not apparent. Nor is there any commitment that the reduction in carrier liability due to publication of deductibles provisions will be accompanied by reductions in rates. See *Atchison T. & S.F. Railroad v. Wichita Board of Trade*, 412 U.S. 800 (1973).

The Commission's decision is silent on these points.[11] And the majority of the court of appeals, which engages in tortuous reasoning to find that the Commission has the power to authorize deductibles, never addresses the question of whether the Commission's decision has a rational basis.

This is a case where a federal agency is attempting, on its own, to legislate a disclaimer of liability for motor carriers in the face of the expressed will of Congress to the contrary. The ICC's decision to authorize limitations of motor carrier liability through the use of deductibles is in derogation of the common law and the Commission's statutory mandate and must be reversed.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the case should be reversed summarily or set for briefing and oral argument.

Respectully submitted,

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Dated: March 9, 1984

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[11]In the case that was before the Commission, the record did not disclose the rates the freight forwarder would charge for its various levels of service. The Commission's assumption that shippers benefit from deductibles because rates come down is completely without record support.

APPENDICES

APPENDIX A

SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC., National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference, Inc., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents.

American Trucking Associations, Inc., Intervening Respondent.

No. 182, Docket 80-4243.

United States Court of Appeals, Second Circuit.

Argued October 4, 1982.

Decided June 13, 1983.

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Before NEWMAN, KEARSE and PRATT, Circuit Judges.

KEARSE, Circuit Judge:

Petitioners Shippers National Freight Claim Council, Inc., National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc., which are national associations of shippers and receivers of goods who are concerned with the responsibilities of carriers of those goods, petition for judicial review of orders of the Interstate Commerce Commission ("ICC" or "Commission")

dated May 13, August 5, and September 18, 1980, and March 17, 1982, interpreting the Interstate Commerce Act ("Act"), 49 U.S.C. § 10730 (Supp. III 1979 & Supp. IV 1980), to permit a motor carrier to limit its liability for loss of or damage to property it transports, by establishment of a rate setting a deductible amount.

We deny the petition.

I. BACKGROUND

A. *Statutory Framework*

The ability of most common carriers subject to the Act to limit their liability for loss of or damage to property transported by them is governed by 49 U.S.C. § 10730 (Supp. IV 1980).[1] Until mid-1980, § 10730 and its predecessor section provided that a carrier could, if the Commission so authorized, establish transportation rates under which its liability for the property transported would be limited to an amount, reasonable under the circumstances, agreed to in writing between the carrier and the shipper.[2]

[1]The jurisdiction provisions of the Act are contained in chapter 105, 49 U.S.C. §§ 10501—10562 (Supp. IV 1980), which gives the Commission jurisdiction over most transportation by interstate rail, rail-water, and pipeline carriers (Subchapter I); by interstate motor carriers (Subchapter II); by interstate water carriers (Subchapter III); and by interstate freight forwarder services (Subchapter IV). Section 10730 governs all of these except water carriers.

[2]The section governing carriers' ability to limit their liability was numbered 10730 in 1978 by the Revised Interstate Commerce Act, Pub.L. No. 95—473, 92 Stat. 1337 (1978), which recodified the Interstate Commerce Act without substantive revision. H.R.Rep. No. 1395, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3009, 3013. Prior to the recodification, the provision had been codified as part of 49 U.S.C. § 20(11) (1976) (carrier may be authorized "by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property").

The arrangement releasing the carrier from a portion of its liability in exchange for a lower transportation rate is commonly referred to as a "released rate" or "released value rate." *See New Procedures in Motor Carrier Restructuring Proceedings,* 359 I.C.C. 399, 427-30 (1978) *("1978 Motor Carrier Restructuring Proceedings").* Prior to July 1980, § 10730 read, in pertinent part, as follows:

> § 10730. Rates and liability based on value
>
> The Interstate Commerce Commission may require or authorize a carrier providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title [*see* note 1 *supra*], to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation.

49 U.S.C. § 10730 (Supp. III 1979). This provision applied to all interstate common carriers of property, other than water carriers, and required that Commission approval be obtained before released rates could be established.

In 1980, § 10730 was amended by two statutes that provided relaxed regulatory requirements for the establishment of released rates by motor carriers of property other than household goods and rail carriers. First, in June 1980, Congress passed the Motor Carrier Act of 1980, Pub.L. No. 96-296, 94 Stat. 793 (July 1, 1980), which was designed to increase competition and to reduce regulation in the trucking industry. 126 Cong. Rec. S3592 (daily ed. Apr. 15, 1980) (remarks of Sen. Packwood, one of the bill's

sponsors). Section 12 of the Motor Carrier Act, which became effective on July 1, 1980, divided § 10730 into two subsections. Subsection (a) consisted of the prior § 10730 but was made inapplicable to motor carriers of nonhousehold property. The new subsection (b) allowed a motor carrier of nonhousehold property to establish released rates without prior approval of the Commission, but provided that the Commission could require the carrier to have in effect full liability rates as well.

Second, in October 1980, Congress passed the Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895 (Oct. 14, 1980), which was designed to improve financial and operating conditions of the national rail system "through financial assistance and freedom from unnecessary regulation." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 80 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4110, 4111 ("Conference Report"). Sections 211(a) and (b) of the Staggers Act, which became effective on October 14, 1980, further amended 49 U.S.C. § 10730 by (1) making §10730(a) inapplicable to rail carriers, and (2) adding a subsection (c) applicable to rail carriers, expressly mentioning that deductibles could be provided for in the released rates. Like § 10730(b) with respect to motor carriers of nonhousehold property, § 10730(c) allowed rail carriers to establish released rates without Commission approval; unlike § 10730(b), § 10730(c) did not specify that the released rate must be "reasonable under the circumstances" and did not give the Commission power to require that full liability rates also be maintained. Section

10730, as amended by the 1980 statutes,[3] reads, in pertinent part, as follows:

> (a) The Interstate Commerce Commission may require or authorize a carrier (including a motor common carrier of household goods but excluding any other motor common carrier of property and excluding any rail carrier) providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title, to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation...
>
> (b)(1) Subject to the provision of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may, subject to the provisions of this chapter...establish rates for the transportation of property (other than household goods) under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

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[3]In 1980 Congress also enacted legislation with respect to the transport of household goods. *See* Household Goods Transportation Act of 1980, Pub.L. No. 96—454, 94 Stat. 2011 (Oct. 15, 1980). This statute retained the restrictions of the pre-1980 § 10730 with respect to motor carriers of household goods notwithstanding its elimination of other federal regulation.

(2) Before a carrier may establish a rate for any service under paragraph (1) of the subsection, the Commission may require such carrier to have in effect and keep in effect, during any period such rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier.

(c) A rail carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property.

B. *Events Leading to the Present Petition for Review*

In February 1980, Interstate International, Inc. ("Interstate"), a freight forwarder engaged in assembling, consolidating, and transporting shipments of property, applied to the ICC for authority to establish released rates on shipments of used household goods. According to the application, the proposed rates were to represent a "fundamental change" in the manner of computing released rates because the basis for calculating the carrier's maximum liability would be volume, instead of the usual referent of weight. In addition, the new rates were to establish three levels of service, each of which would be accompanied by a different level of carrier liability. Plan A, which provided, *inter alia,* the fastest and most certain

delivery times, was to limit the carrier's liability to $12,000 per unit (400 cubic feet); Plan B, which provided lesser services, was to limit the carrier's liability to $4,000, less a $25 deductible, per unit; and Plan C, which provided the least amount of service, was to limit the carrier's liability to $1,600, less a $50 deductible, per unit. A shipper was to be able to purchase coverage in excess of the amounts specified by the plan chosen.

Notice of Interstate's application was published in the *Federal Register,* 45 Fed. Reg. 17,682 (1980), but the summary of the application emphasized Interstate's proposal to base released rates on volume and did not mention that two of its three released-rate plans contained deductibles. It appears that the application was unopposed, and on May 13, 1980, the Commission's Released Rates Board approved the application, finding that "the concept of a deductible...is reasonable under the circumstances surrounding the transportation." *Interstate International, Inc., Used Household Goods,* No. FF-303, at 1 (I.C.C. May 13, 1980).

In June 1980, the petitioners, having learned the details of Interstate's application, petitioned for reconsideration by the ICC, on the principal grounds that under common law Interstate was liable for the full extent of loss or damage to property transported by it and that deductibles were not authorized by the Interstate Commerce Act. These petitions were denied on August 5, 1980, by three ICC Commissioners acting as an Appellate Division ("Division 1"), stating, in pertinent part, as follows:

> The appropriateness of released rates on shipments of household goods has long been recognized by the Commission. Shippers are free to assess the relative

merits of Interstate International's innovative method of rating vis-a-vis the competition in making their selection.

Petitioners attack the concept of a deductible as inappropriate mainly because it reduces a carrier's interest in the security of freight it transports. However, this is true of all released rates since their only purpose is to reduce a carrier's liability below the actual loss or damage sustained by a shipper. In return, of course, shippers receive the benefit of reduced rates. Consequently, we find that the sought authority to establish and maintain the involved rates has been justified.

Interstate International, Inc., Used Household Goods, No. FF-303 (I.C.C. Aug. 5, 1980) (*"Division 1 Decision"*). Petitioners' request for further administrative review of the Division 1 decision was denied on September 8, 1980, by the Commission which found petitioners' arguments "unpersuasive." *Interstate International, Inc., Used Household Goods,* No. FF-303 (I.C.C. Sept. 18, 1980).

In December 1981, petitioners petitioned the ICC for a declaratory order that 49 U.S.C. § 10730, as amended through October 1980, did not permit deductibles by carriers other than railroads. They contended that the 1980 amendments, which expressly stated that rail carrier released rates could provide for deductibles, but were silent as to the use of deductibles by other types of carriers, demonstrated that deductibles could not be approved for nonrail carriers. The Commission rejected petitioners' contentions, stating, in part, as follows:

An express authorization contained in one

section of a statute does not imply pervasive prohibitions in other sections. See *American Trucking Association v. Atchison T. & S.F. R.R.*, 387 U.S. 397, 411 [87 S.Ct. 1608, 1616, 18 L.Ed.2d 847] (1967). Nor can a prohibition against deductibles be read into the language of subsections 10730(a) and (b). Subsection (a) gives the Commission broad discretion to require or authorize household goods rates under which the carrier's liability is limited to a value established by written declaration of a shipper, when that value would be reasonable under the circumstances surrounding the transporation. Broad discretion is also given the Commission to determine what is reasonable in each circumstance. Discussing the released value provision of 49 U.S.C. 20(11), the predecessor of Section 10730, a court has held that "the Commission has discretion . . . to authorize any form of released value provision, so long as it finds the rates that are based on that provision to be just and reasonable under the circumstances and conditions surrounding the transportation." *National Motor Freight Traffic Ass'n, Inc. v. I.C.C.* 590 F.2d 1180, 1185 (D.C. Cir. 1978). Moreover, there is no legitimate reason to distinguish, as petitioners attempt, between released rates and deductibles. Both have similar effects on carrier liability, although each limits it in a somewhat different fashion.

Accordingly, we conclude that Section 10730(a) does not limit the kind of value limitation the Commission may approve. We also note that this reasoning is consistent with the policy of the Household Goods Transportation Act of 1980, which declares that maximum flexibility on the part of the carriers in the

pricing of their services best serves the shippers of household goods and allows a variety of quality and price options to meet market demands. (See Section 2(a)(3).) The same reasoning applies equally to Section 10730(b). No ban against deductibles is supported by the statutory language of that section.

We find:

The statutory language of 49 U.S.C. 10730 permits deductibles for released rates by written declaration of the shipper or by written agreement between shippers and motor common carriers of household goods, between shippers and other motor common carriers, and between shippers and rail carriers.

Petition for Declaratory Order on Deductibles in Household Goods Released Rates, No. 38752, at 4—5 (I.C.C. Mar. 17, 1982).

Petitioners seek judicial review in this Court of the Commission's March 17, 1982 declaratory order and its 1980 released-rate orders, urging that the Commision's decisions be vacated and that § 10730 be interpreted to prohibit use of deductibles by nonrail carriers.[4] For the reasons below we deny the petition.

II. DISCUSSION

Petitioners contend that the Commission's decisions should be set aside on the ground that the Commission has arbitrarily and irrationally ignored pertinent canons of

[4]Petitioners initially had petitioned this Court for judicial review of the released-rate orders in December 1980. That petition was withdrawn in order to permit petitioners to seek declaratory relief from the Commission or legislative relief from Congress.

statutory construction and has thereby interpreted § 10730 in a manner inconsistent with the intentions of Congress. In particular, petitioners challenge the Commission's authority to allow nonrail carriers to use deductibles on the grounds that (1) since statutes in derogation of the carrier's liabilities at common law should be narrowly construed and since common law prohibited deductibles, the silence of §§ 10730(a) and (b) should not be construed as permitting deductibles; and (2) by explicity allowing in § 10730(c) the use of deductibles by rail carriers, Congress revealed its intention to deny use of deductibles to other carriers. We reject both arguments.

A. *The Common Law Argument*

[1-3] Petitioners' first argument invokes the principle that statutes in derogation of common-law duties should be construed as altering those obligations only to the extent expressly provided. They contend that since common law did not permit deductibles, the silence of §§ 10730(a) and (b) with respect to deductibles may not be construed as permitting deductibles. We find this argument unpersuasive because we are not convinced that common law did indeed prohibit a carrier and a shipper from agreeing on a rate that included a deductible.

At common law, absent a contrary agreement between carrier and shipper, a carrier's liability for loss of or damage to goods entrusted to the carrier was virtually unlimited; unless the loss was caused by an act of God, a public authority, a public enemy, or the shipper, or was caused by the inherent vice or nature of the goods themselves, the carrier was liable for the full extent of the loss. *See, e.g., Missouri Pacific Railroad v. Elmore & Stahl,* 377 U.S. 134, 137, 84 S.Ct. 1142, 1144, 12 L.Ed.2d 194 (1964), and cases

cited therein. Further, under common law, courts refused to enforce an agreement between carrier and shipper purporting to relieve the carrier from all liability for loss of property occasioned by the negligence of the carrier or its servants. *See Adams Express Co. v. Croninger,* 226 U.S. 491, 509, 33 S.Ct. 148, 153, 57 L.Ed. 314 (1913). Such exculpatory contracts were held to violate public policy because they would tend to invite carelessness on the part of the carrier.

Nevertheless, common law did recognize as enforceable an agreement between carrier and shipper whereby the carrier's liability for loss of property, including loss occasioned by its own negligence or that of its servants, was not entirely eliminated but was merely limited, so long as the limitation was granted by the shipper in consideration for a lower rate of freight than would reasonably be charged for the carrier's unlimited liability. *Hart v. Pennsylvania Railroad,* 112 U.S. 331, 340, 5.Ct. 151, 155, 28 L.Ed. 717 (1884); *see also Boston & Maine Railroad v. Piper,* 246 U.S. 439, 444, 38 S.Ct. 354, 355, 62 L.Ed. 820 (1918); *George N. Pierce Co. v. Wells, Fargo & Co.,* 236 U.S. 278, 284, 35 S.Ct. 351, 353, 59 L.Ed. 576 (1915); *Adams Express Co. v. Croninger, supra,* 226 U.S. at 509—10, 33 S.Ct. at 153. The rationale for enforcing contracts that limited the carrier's liability in such cases was that the carrier was entitled to know the extent of its potential liability for loss of the property and to be compensated in proportion to the risk assumed. Hence the contractual limitation on the carrier's liability was viewed not as the carrier's attempt to exonerate itself from losses negligently caused by it, but rather as the agreement of carrier and shipper in advance on the maximum compensation the shipper would recover should the property be lost or damaged, with the freight rate keyed to the size of the carrier's risk. As the Supreme Court

explained in *Hart v. Pennsylvania Railroad, supra:*

> The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy.

According to *Hart*, "the proper test to be applied to every limitation of the common-law liability of a carrier [is] its just and reasonable character." *Id.* at 342, 5 S.Ct. at 156. Accordingly, so long as the limitation of liability was the result of a "fair, open, just and reasonable agreement" between carrier and shipper, entered into by the shipper "for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of risk," *Adams Express Co. v. Croninger, supra,* 226 U.S. at 509—10, 33 S.Ct. at 153, and the shipper was given "the option of higher recovery upon paying a higher rate," *Boston & Maine Railroad v. Piper, supra,* 246 U.S. at 444, 38 S.Ct. at 355, the agreement was enforceable at common law.

Petitioners argued that these permissive common-law principles do not govern the instant proceeding because a deductibles is in essence an exoneration from, rather than a

limitation of, liability. The practical accuracy of petitioners' characterization will depend, of course, on the size of the deductible in relation to the intrinsic worth of the property. If the deductible is $50 and the property is worth that amount or less, the effect of choosing the deductible would be to exonerate the carrier from any liability for loss. If the property is worth more than the deductible amount, however, there is no qualitative difference between use of the deductible and use of the more common released rate establishing the shipper's maximum recovery. As the Commission recognized, the "only purpose [of either] is to reduce a carrier's liability below the actual loss or damage sustained by a shipper." *Division 2 Decision, supra.* Using a deductible, the shipper agrees to forgo recovery of the *first X* dollars of its loss, whereas under the more common released-rate agreement the shipper agrees to forgo recovery of the *last Y* dollars of its loss. Either formulation would permit the carrier to limit its liability. We are aware of no authority holding that an agreement for a deductible is uneforceable at common law, and if the agreement were fair and reasonable, were entered into by the shipper in order to gain a lower transportation charge, and the shipper had the option of paying a higher charge to obtain greater coverage, we see no basis for inferring that such an agreement would be unenforceable at common law. Indeed, since "the proper test to be applied to *every* limitation of the common-law liability of a carrier [is] its just and reasonable character," *Hart v. Pennsylvania Railroad, supra,* 112 U.S. at 342, 5 S.Ct. at 156 (emphasis added), even agreement on a deductible that exceeded the intrinsic worth of the property might have been enforced at common law if the shipper could thereby have obtained a low freight rate and had the

option of paying a higher, reasonable, rate to avoid the deductible.[5]

In sum, we disagree with petitioners' premise that an agreement for a released rate including a deductible would necessarily have been unenforceable at common law. Accordingly, we do not view the Commission's authorization of the use of the deductible as a derogation of the common-law liability of the carrier.

B. *The Statutory Construction Argument*

[4] Petitioners contend that the "plain meaning" of the explicit provision in § 10730(c) for use of deductibles by rail carriers is that Congress intended to prohibit use of deductibles by all other carriers. Mere incantation of the plain meaning rule, however cannot substitute for meaningful analysis, *New York State Commission on Cable Television v. FCC,* 571 F.2d 95, 98 (2d Cir.), *cert. denied,* 439 U.S. 820, 99 S.Ct. 85 58 L.Ed.2d 112 (1978); *see American Trucking Associations v. ICC,* 656 F.2d 1115, 1120 (5th Cir. 1981), and our analysis of the Interstate

[5]On the other hand, a sizeable deductible in connection with small shipments, unaccompanied by the option for greater coverage at a higher rate, would undoubtedly have been disapproved by the Commission, which in 1978 expressed its "concern[] about the small shipper who cannot [absorb losses due to increased risk in conjunction with released rates] and who, therefore, requires that the carrier accept greater liability." *1978 Motor Carrier Restructuring Proceedings, supra,* 359 I.C.C. at 433. Thereafter, prior to the 1980 amendments to § 10730, the Commission promulgated rules requiring that any small shipments tariff containing released rates include a rate under which the carrier would assume full common carrier liability and requiring that the released and full value rates be reasonable and bear a reasonable relationship to one another. *Released Rates in Conjunction with a Small Shipments Tariff,* 362 I.C.C. 614, 617 (1980).

Commerce Act prior to 1980 and of the 1980 amendments persuades us that Congress did not intend to prohibit use of deductibles by nonrail carriers.

We commence our statutory inquiry with the Act as it was interpreted prior to the 1980 amendments, and we find in the history of the Act nothing to indicate that Congress intended at any time after 1916 to restrict carriers' ability to limit their liability through released rates. Although a restrictive intention had been mainfested earlier,[6] in 1916 Congress explicity authorized the Commission to approve released rates. Congress did not at that time specify what form these limitations of liability might take, and it did not in the intervening years seek in any way to circumscribe the Commission's discretion to approve particular types of contractual limitations on the carrier's liability.

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[6]In 1906, Congress had passed the Carmack Amendment to the Interstate Commerce Act, ch. 3591, sec. 7, 34 Stat. 584, 593-95 (1906), which provided that no contract, rule, receipt, or regulation could exempt a carrier from full liability. The courts, however, read this directive as nothing more than a codification of common-law principles, and they continued to uphold reasonable released-rate agreements, reasoning that such arrangements were not exemptions from liability but "agreement[s] as to the method by which the carrier would have to account to the shipper in case of loss." Mulcahy, *Motor Carrier Cargo Liability—An Overview*, 49 I.C.C. Prac. J. 257, 260 (1982) (citing, *inter alia*, *Adams Express Co. v. Croninger, supra*). Congress responded in 1915 by passing the first Cummins Amendment, ch. 176, 38 Stat. 1196 (1915), which prohibited all released-rate arrangements except in the case of goods that were concealed and whose character was unknown to the carrier. Within a year, however, Congress determined that the first Cummins Amendment was too restrictive; it passed the second Cummins Amendment, ch. 301, 39 Stat. 441 (1916), which returned to the common-law practice of permitting released rates, but permitted such arrangements only if authorized by the ICC.

In these circumstances, both the Commission and the courts have construed the Commission's authority broadly, ruling that whether to permit or prohibit proffered types of limitations was a matter committed to Commission discretion. For example, in *Rules, Regulations, and Parctices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims,* 340 I.C.C. 515 (1972), the Commission stated as follows:

> [T]he legislative history of section 20(11) [the predecessor of § 10730] shows that its adoption developed mainly as the result of the situtation in which railroads published rates with extremely low released values with the practical result that shippers had a choice of rates in name only because the full actual value rates were too high to be used. In this respect, therefore, the *Congress chose to leave it solely in our discretion whether to grant exceptions to the common law rule of full liability based upon the reasonableness and adequacy of a shipper's recovery* for loss or damage to cargo in the light of a reduction in the freight charges.

Id. at 591 (emphasis added). Similarly, in *National Motor Freight Traffic Association v. I.C.C.* 590 F.2d 1180 (D.C. Cir. 1978), *cert. denied,* 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979), the court of appeals affirmed a Commission order that approved a new form of released-rate agreement, noting that

> the Commission has discretion under § 20(11) [the predecessor to § 10730] to authorize any form of released value provision, so long as it finds the rates that are based on that provision to be just and reasonable surrounding the transportation.

Id. at 1185 (footnote ommitted). *See also Household Goods Carriers' Bureau v. ICC,* 584 F.2d 437, 441 (D.C.Cir.1978) ("We cannot substitute our judgment for that of the Commission in determining what exceptions to carrier liability beyond those at common law are dictated by the national transporation policy.")

[5] While none of these decisions ruled on released rates that included deductibles,[7] we agree with the Commission's analysis, *see Division 1 Decision, supra,* that there is no difference in principle between a deductible, which establishes a floor figure for the shipper's recovery, and an

[7]We are unimpressed by petitioners' observation that prior to the Interstate application, the Commission had never approved a rate that included a deductible. The Commission represents, and there is no contrary indication on the record, that no carrier had ever before sought such approval.

Nor, however, are we influenced by the Commission's contention that in 1978 *Motor Carrier Restructuring Proceedings, supra,* 359 I.C.C. at 434, it had "indicated...that [deductibles] clauses are an acceptable and legitimate means of limiting carrier liability." (ICC brief at 34.) We find the reference to deductibles in that report rather ambiguous, and since the Commission's characterization is made in a litigation document rather than an administrative order of the type to which we could ordinarily feel constrained to defer, *see, e.g., National Motor Freight Traffic Association v. ICC, supra,* 590 F.2d at 1185, we place no reliance on the report or the Commission's characterization of it.

arrangement that sets a ceiling.[8] Either is designed to reduce the carrier's liability below the shipper's actual loss, and we are aware of no authority, legislative, regulatory, or judicial, expressing the view that such a reduction may not be achieved through the use of deductibles.[9]

We conclude that Congress's decision to entrust the approval of transportation rates limiting carrier liability to the Commission without any statutory directive confining it to specific types of limited-liability arrangements left the Commission, prior to the 1980 amendments to § 10730, with authority to approve the use of deductibles in the event that a carrier proposed them and the Commission found them to be reasonable.

[8]Petitioners argue that a deductible is fundamentally different from the traditional released rate because the latter represents the value of the property shipped, whereas the former is a predetermined amount to be subtracted from that value. This contention misperceives the thrust of the term "value" in § 10730. The reference in that section to "a value established by written declaration of the shipper, or by written declaration of the shipper, or by written agreement," is not a reference to the intrinsic worth of the property but rather to the maximum compensation that the parties agree the shipper may recover for a loss. *Cf. George N. Pierce Co. v. Wells, Fargo & Co., supra,* 236 U.S. at 285, 35 S.Ct. at 353 ("[T]he legality of the contract do not depend upon a valuation which shall have a relation to the actual worth of the property.") Likewise at common law there was no requirement that the agreed "value" have any relation to the property's intrinsic worth. *See id.* at 283—85, 35 S.Ct. at 353—54; *see also Hart v. Pennsylvania Railroad, supra,* 112 U.S. at 341, 5 S.Ct. at 156 (shipper and carrier may agree to liquidated damages).

[9]We disagree with petitioners' contention that in *Secretary of Agriculture v. United States,* 350 U.S. 162, 76 S.Ct. 244, 100 L.Ed. 173 (1956), the Supreme Court ruled that deductibles were an unlawful limitation of the carrier's liability. At issue before the Court was the ICC's approval of a tariff that included a 3% "claims tolerance" to be deducted from every claim against a railroad with regard to transportation of eggs. (We note parenthetically our disagreement with

[6] We do not view the 1980 amendments as having deprived the Commision of the authority to permit use of deductibles. As discussed in Part I.A. above, subsections(a) and (b) of § 10730 took substantially their present form with the passage of the Motor Carrier Act in June 1980. Nothing in the legislative history of the Motor Carrier Act suggests that Congress then intended to forbid use of deductibles as a method of limiting a carrier's liability. Indeed, the contrary is suggested. In furtherance of the Motor Carrier Act's general goal of increasing competition in the industry, *see* H.R.Rep. No. 1069, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad.News 2283, 2285 ("Motor Carrier Act Report"), § 12 of the legislation, which modified § 10730, was specifically designed to "foster more competition in the pricing of transportation service," *id,* at 26, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2308. It was envisioned that the availability of a variety of released rates would enhance price competition and reduce the rates a shipper would pay.[18] The variety was likened to greater and lesser amounts

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petitioners' characterization of these "tolerances" as a type of deductible, and note also that the characterization contradicts petitioners' own argument (*see* note 7 *supra*) that the Commission had never before 1980 approved a deductible.) The Supreme Court reversed the district court's approval of the ICC order solely on the ground that the ICC had failed to support its decision with "findings upon which [the Court] can say that the Commission's conclusion was reasonably based." *Id.* at 167, 76 S.Ct. at 248. The Court expressly declined to consider the shippers' argument that such "tolerances" were a forbidden form of limitation of liability. *Id.* at 165—66, 76 S.Ct. at 246—47.

[18]Like the Motor Carrier Act and the Staggers Rail Act, the Household Goods Transportation Act; Pub.L. No. 96—454, 94 Stat. 2011 (Oct. 15, 1980), sought to establish "maximum carrier flexibility in pricing." H.R. Rep. No. 1372, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4271, 4275

of insurance coverage, with the shipper to have the option to forgo coverage entirely, as it might wish to do for property of low value, in order to obtain a lower freight rate. The Motor Carrier Act Report described the thrust of § 12 as follows:

> Permiting released value rates increases the range of choices available to the shipping public. With a full value rate, a shipper pays one price for two distinct services which are tied together, the actual linehaul of a commodity from one point to another and full insurance on the commodity on that movement. Released rates, in effect, allow the shipper to pay a lesser price for hauling the goods and a separate agreed-upon price for whatever amount of insurance the shipper desires. Consequently, if the commodities are of low value or if the shipper wants to take the risk, the shipper may want only partial insurance *or none at all.* Having this option should reduce the total price the shipper must pay for the transportation.

Id. at 25-26 (emphasis added), *reprinted in* U.S. Code Cong. & Ad. News at 2307-08.

Thus, while the crux of petitioners' complaint is that the practical effect of a deductible for property of low value is to deprive the shipper of any recovery, this appears to be precisely one of the options Congress sought, in the Motor Carrier Act, to have available.

Nor do we view Congress's passage of the Staggers Rail Act several months later, with its express recognition that rail carriers could use deductibles, as reason to believe that Congress intended—either when it passed the Motor Carrier Act or when it passed the Staggers Act—to deny deductibles to nonrail carriers. There is nothing to suggest that in passing the railroad legislation Congress believed it was taking away an existing option from nonrail carriers. And there is no indiction that either house of Congress

conceived of deductibles as a newly available option. Indeed there is some reason to believe that they considered deductibles already authorized.

The original Senate version of the railroad legislation, S. 1946, 96th Cong. 1st Sess. (1979), approved by the Senate on April 1, 1980, would have amended § 10730 to permit railroads to establish released reates without Commission supervision and without reference to the "just and reasonable under the circumstances" test. The released-rate language used in S. 1946. i.e.,

> establish rates for the transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and the shipper,

was virtually identical to the language of § 10730 as it then existed. Deductibles were not explicity mentioned, but at least one witness before the Senate Committee that held hearings on S. 1946 in 1979 had expressed the view that the released rates could include deductibles: "We assume that, in permitting liability to be limited 'to a value established' by agreement, the provision permits the parties to agree to deductibles since that is a common insurance practice." 1 *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 Before the Senate Comm. on Commerce, Science, and Transportation,* 96th Cong., 1st Sess. 603 (1980) (supplemental statement of William H. Dempsey, President of the Association of America Railroads).

The origin of the express reference to deductibles was the House of Representatives version of the railroad legislation, H.R. 7235, 96th Cong., 2d Sess. (1980), first approved by the House on September 9, 1980, which proposed the same relaxations with respect to released rates as appeared in S. 1946, but also specified that the released

rates could include a deductible. In the Senate, when the two versions of the railroad legislation, which differed in many other respects as well, were about to be sent to conference, there was discussion of some of the other differences between the two bills, 126 Cong. Rec. S12,915—16 (daily ed. Sept. 18, 1980), but the reference in H.R. 7235 to deductibles occasioned no comment. It is a permissible inference that the Senate viewed the difference as one of form, and had agreed with the view that deductibles were implicitly permitted by S. 1946, and hence by § 10730 as it then existed.

The Conference Committee eventually recommended adoption of H.R. 7235's treatment of released rates, Conference Report, *supra,* at 102-03, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4134-35, and this was the version that eventually was approved by both houses of Congress. We find no suggestion, however, that Congress believed that adoption of the House language mentioning deductibles constituted a change in the law.[11] The

[11] Petitioners rely on an ICC report to Congress one year after the 1980 amendments were enacted as support for their proposition that deductibles were not permitted before the Staggers Rail Act was passed. The report contained the following statement:

> A second change made by the Staggers Act was to permit deductibles. Prior to the Staggers Act, released rates were rates lower then [*sic*] full value rates which carried a limitation on the amount of damages recoverable in the event of loss or damage. Released rates may now specify a deductible in addition to the stated limitations on the amount recoverable.

Rail Carriers Cargo Liability Study, Ex Parte No. 403, at 8-9 (I.C.C. Oct. 9, 1981), as quoted in Petitioners' brief at 18 n. *. While this 1981 statement might be read as indicating the belief that petitioners ascribe to the Commission, such a reading is squarely contradicted, insofar as nonrail carriers are concerned, by the Commission's 1980 rulings on Interstate's application to use deductibles and on petitioners' requests for reconsideration, and its 1982 ruling on petitioners' request for a

Conference Report described the released rate provision as follows:

> To provide both shippers and railroads with greater rate-service options the Act permits the establishment of lesser liability requirements than presently assured by law.

Conference Report, *supra,* at 82, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4113. The use of deductibles was indeed not "assured" under prior law, because all released rates were subject to Commission approval, and the ICC had been reluctant to approve any type of released rates for railroads even when there was no opposition.[12] *See* S. Rep. No. 470, 96th Cong., 1st Sess. 32 (1979). But if

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declaratory order, all quoted in Part I.B. *supra.* We think it more likely that the statement reflected the practical fact that, as recognized by the Senate, the ICC had been hesitant prior to the 1980 amendments, even when there was no opposition, to approve any sort of released rates by railroads. *See S.* Rep. No. 470, 96th Cong., 1st Sess. 32 (1979).

[12]These factors and Congress's desire to "assure" that deductibles would be permitted may provide a clue to why Congress would take pains to specify that railroads were entitled to use deductibles if it believed that deductibles were a form of limitation of liability the Commission previously could have authorized. By simply eliminating the ICC's authority to review railroads' released rates, Congress removed the uncertainty inhering in the subjection of those rates to administrative review. But that simple elimination of ICC review also made it less certain that released rates would pass muster on judicial review. Under the prior regulatory scheme, if the Commission had approved a released rate including a deductible, a reviewing court would likely have deferred to the Commission's discretion and upheld the limitation of liability, *see, e.g., National Motor Freight Traffic Association v. ICC, supra;* without that layer of administrative insulation between the railroad and a court reviewing its released-rate structure, however, the outcome of judicial review would be a good deal less certain. Thus, it may well be that in explicitly mentioning deductibles Congress simply meant to "assure" that this type of liability limitation, which had not previously been used, would not be set aside by the courts on the basis of its novel form.

Congress had viewed deductibles as a form of limitation of liability that the Commission could not have authorized, we would have expected the Conference Report to mention deductibles as a feature not then "available" under the law, rather than simply not "assured."

Finally, nowhere in the legislative history do we find any indication that Congress believed it was denying deductibles to carriers other than railroads. So far as we have been able to determine, in discussing the Motor Carrier Act the legislators never discussed released rates for railroads; and in discussing the railroad legislation they never discussed the released-rate structure for motor carriers. Given the absence of any cross-discussion, it hardly seems reasonable to make the "vast leap," urged by petitioners, from the "particular authorization" of deductibles for railroads to "a pervasive prohibition" for nonrail carriers. *American Trucking Associations v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 411, 87 S.Ct. 1608, 1616; 18 L.Ed.2d 847 (1967).

The petition for review is denied.

GEORGE C. PRATT, Circuit Judge, dissenting.

My colleagues find no difference "in principle" between a deductible and a released value, and thus conclude that since 1916 Congress has intended a deductible to be a permissible released value limitation under 49 U.S.C. § 10730. As a result they have permitted carriers of household goods, despite contrary statutory language, to disclaim liability for loss, theft, or damage to a householder's property up to the deductible amount. Since I cannot accept their analysis of § 10730, their premise that a deductible is a

released value, or the "license to steal" that they grant to carriers of household goods, I dissent.

I.

The issue before us is not whether a deductible should be permitted as a means of limiting carriers' liability—a decision for Congress and not this court—but rather, whether Congress has authorized deductibles for carriers of used household goods in 49 U.S.C. § 10730(a). My colleagues perceive a continous congressional intent to authorize deductibles that began in 1916. They discern this

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"[A]ny common carrier * * * shall be liable to the lawful holder [of a receipt or bill of lading] for any loss, damage, or injury to such property caused by it * * *, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier * * * from the liability imposed; and any such common carrier * * * shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage, or injury to such property * * *, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading * * *; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void; * * * *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, * * *; second, to property * * * concerning which the carrier shall have been or shall be expressly authorized * * * to establish and maintain rates dependent upon the value declared in writing by the shipper and agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, * * *.

49 U.S.C.A. § 20(11) (West 1951).

intent despite a contradictory statutory history that led to the 1916 amendment, despite emphatic statutory language to the contrary, despite the structure and language of the current statute, and despite the absence of any showing that anyone had ever, prior to 1980, advanced the idea of using deductibles in the context of carriers' liability.

I can find nothing in Congress's language up to 1916 to suggest anything but disapproval of a deductible or any form of limitation of liability that would exempt the carrier from responsibility for the initial dollars of every loss or damage to the shipper's property. If, as my colleagues believe, Congress in 1916 intended to authorize a deductible, it chose strange language indeed to express that intent.

In the relevant portions of the 1916 statute, set forth in the margin,* Congress expressed its basic disapproval of limitations on a carrier's liability: "any such limitation" regardless of form was declared "to be unlawful and void". As an exception to this blanket prohibition, Congress permitted rates that included carefully defined released values as long as they would "have no other effect than to limit liability and recovery to an amount not exceeding the value" declared by the shipper or agreed by the parties to be the "released value" of the goods. This language is precise and readily includes released values. Only by extreme, and in my view unjustified, generalization can it fairly be said to include deductibles.

In relevant part the statute remained in its 1916 form until 1978 when Congress enacted Public Law No. 95-473, entitled "an Act To revise, codify, and enact without substantive change the Interstate Commerce Act and

related laws subtitle IV of title 49, United States Code, 'Transportation' ". 92 Stat. 1337. This 1978 act was merely a recodification of the prior statutes included in the Interstate Commerce Act. Congress expressly negated any intention to change prior law:

> Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced.

Pub.L. No. 95-473, § 3, 92 Stat. 1337, 1466 (1978).

To replace and restate the elaborate 1916 prohibition against agreements limiting carriers' liability, Congress provided in § 10730 that the Commission may require or authorize a carrier

> * * * to establish rates for transportation of property under which the *liability* of the carrier for that property *is limited to a value* established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation (emphasis added).

49 U.S.C. § 10730(a).

By Congress's command, this language of § 10730 "may not be construed as making a substantive change" in the prior law, which had expressly declared any limitation of liability to be unlawful and void except an agreement limiting liability and recovery "to an amount not exceeding the [declared or released] value." Thus, Congress in 1978 continued to authorize limitations of liability, but only in terms of an established value of the goods. Since

deductibles have nothing to do with the value of the goods, it follows that Congress did not intend in 1978 to permit deductibles.

Furthermore, one would think that if Congress had perceived its intent in 1978 as the majority perceives it now—to permit deductibles as well as released values—Congress would have expressed that intent specifically, just as it did two years later. In 1980 Congress passed three amendments substantially revising the Interstate Commerce Act, one of which did specifically authorize deductibles for railroads. When read together, these three amendments simply and directly confirm that Congress did not intend to authorize deductibles in the transportation of household goods, the specific issue now before the court.

Prior to 1980 Congress had applied the same statute, § 10730, to various types of carriers, including railroads, motor carriers of household goods, and other motor carriers. All three of these carriers (1) needed advance approval of their rates, (2) were permitted to offer rates under which the carrier's liability was "limited to a value" established by declaration or agreement, and (3) were required to establish limiting values that were "reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 10730 (Supp. II 1978). The 1980 amendments divided § 10730 into three subsections, one for each of these carriers, and treated each carrier differently with respect to these three requirements.

The "Staggers Rail Act," Pub.L. No. 96-448, 94 Stat. 1895, passed October 1, 1980, no longer required railroads either to have their rates approved in advance, or to establish released values that were reasonable. Railroads

were specifically authorized to use deductibles, which were described as "specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property." Pub.L. No. 96-448, 94 Stat. 1911; 49 U.S.C. § 10730(c) (Supp. IV 1980).

The "Motor Carrier Act of 1980," Pub.L. No. 96-296, 94 Stat. 793, passed June 20, 1980, released motor carriers of other than household goods, like the railroads, from the requirement of advance approval of rates. Congress continued the authorization for released value rates and the requirement that their declared or agreed values be reasonable. Unlike the railroads, these carriers were not expressly authorized to use deductibles. 49 U.S.C. § 10730(b) (Supp. IV 1980).

In the "Household Goods Transportation Act of 1980", Pub.L. No. 96-454, 94 Stat. 2011, passed September 30, 1980, Congress was significantly more restrictive with carriers of household goods than it was with the other carriers. Unlike the railroads and other motor carriers, it continued to require advance approval of rates by the commission. Unlike the Staggers Act and the Motor Carrier Act, the Household Goods Transportation Act continued to require advance approval of rates by the commission. Unlike the Staggers Act, it required that the released values be reasonable, and did not expressly authorize deductibles. 49 U.S.C. § 10730(a) (Supp. IV 1980).

My colleagues' interpretation of the amended § 10730, insofar as they find deductibles included in the released value provisions, distorts the plain language of the statute

and renders the deductible provision in subsection (c) surplusage, thereby violating the elementary canon of construction that courts must give effect to every word in a statute. *Bird v. United States,* 187 U.S. 118, 124, 23 S.Ct. 42, 44, 47 L.Ed. 100 (1902); *Platt v. Union Pacific R.R. Co.,* 99 U.S. 48, 58, 25 L.Ed. 424 (1878). It also frustrates some of the policy aims Congress sought to achieve in the 1980 amendments.

If, as the majority holds, the commission is now properly exercising some latent authority to approve deductible limitations for carriers of household goods covered by subsection (a), it would seem to follow from the identical language in the Motor Carrier Act, codified at 49 U.S.C. § 10730(b),and taken from the same source in the 1916 statute, that Congress must also have intended to permit the other motor carriers to offer rates including a deductible, *without first obtaining commission approval.* Indeed, the commission has so held. *See Decision on Petition for Declaratory Order on Deauctibles in Household Goods Released Rates,* No. 38752, at 4—5 (I.C.C. Mar. 17, 1982). However, the Motor Carrier Act itself suggests just the opposite, because it restricts sharply any attempt by the commission to deregulate the trucking industry in defiance of the statute. In section 3 of the Act, Congress specifically admonished that

> * * * the Interstate Commerce Commission should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; that the Interstate Commerce Commission should not attempt to go beyond the powers invested in it by the Interstate Commerce Act and other legislation enacted

> by Congress; and that the legislative and resulting changes should be implemented with the least amount of disruption to the transportation system consistent with the scope of the reforms enacted.

Pub.L.No. 96-296, 94 Stat. 793 (1980). The house report to the Motor Carrier Act cautioned the commission "to stay within the powers specifically vested in it by the revised law." H.R.Rep. 1069, 96th Cong., 2d Sess. 11 (1980) *reprinted in* 1980, U.S.Code Cong. & Ad.News 2283, 2293.

Despite this rather clear language, the majority reasons that prior to 1980, Congress "entrust[ed] the approval of transportation rates to the Commission without any statutory directive," and finds nothing in the 1980 amendments "as having deprived the Commission of the authority to permit the use of deductibles." Such a permissive, broad reading of § 10730 seems inconsistent with the narrow interpretation both enacted and urged by Congress, and it substantially undermines Congress's attempts to rein in the commission.

Even were I to disregard Congress's strong historical leanings toward prohibiting limitations of carriers' liability, the language that Congress used in 1980 to restructure these three branches of the industry would still convey to me an intention that rail carriers should have deductibles, but motor carriers should not. And when I read these amendments in light of Congress's earlier hostility to limitations of liability, this intention becomes inescapably clear.

II.

Central to my disagreement with the majority is their premise that deductibles do not differ from released value

limitations. The majority artfully defines the released value provision in subsection (a) of § 10730 to include both released value limitations *and* deductibles, and therefore can logically conclude that § 10730(a) permits the commission to approve rates with a deductible limitation. However, the term "released value" has a specific and narrower meaning, which in light of prior case law and common sense cannot fairly be read to include a deductible.

As my colleagues acknowledge, the common law considered void, as against public policy, any agreement or limitation that insulated a carrier from liability for its own negligence or for the willful acts of its employees. And I acknowledge that the common law recognized an exception for agreements, known as released value limitations, whereby "the carrier's liability for loss of property, including loss occasioned by its own negligence or that of its servants, was not entirely eliminated but was merely limited," at p. 746, to a stated value in consideration for a lower rate. *See Adams Express Co. v. Crominger,* 226 U.S. 491, 512, 33 S.Ct. 148, 154, 57 L.Ed. 314 (1913). We disagree over whether a deductible is the same as a released value.

They are not the same, and the differences are significant. When liability is limited to a released value, the carrier is fully liable for all loss or damage up to the agreed or declared value of the shipment; when a loss occurs the shipper is estopped from asserting that the value of the shipped goods exceeded what he had declared in advance. As the Supreme Court noted in *Adams Express, supra,*

> It is not in any proper sense a contract exempting him from liability for the loss, damage, or injury to the property, as the shipper describes it in stating its value

> for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumed.

Adams Express Co. v. Croninger, supra at 512, 33 S.Ct. at 154, *quoting Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N.E. 325, 327 (1910). The common law's intolerance of agreements exonerating carriers for their own negligence or misconduct was thus relaxed in recognition of the obvious fact that the cost of transporting goods was inextricably bound to the risks that carriers must assume for their damage or loss. By fixing a maximum value in advance, the carrier could know what degree of care was required, and the shipper was assured of recovery of his losses up to the amount declared.

A deductible has a different effect, because it exonerates the carrier from all liability up to the deductible amount. A deductible does not discourage carrier negligence or theft: it imposes no liability on the carrier for many losses and excuses at least part of every loss. In contrast, a limitation based on a released value encourages care because it imposes some liability on the carrier for every loss. Thus, it is simply not accurate to say there is no difference "in principle" between a deductible and a released value limitation.

In *Hart v. Pennsylvania R.R. Co.*, 112 U.S. 331, 5 S.Ct. 151, 28 L.Ed. 717 (1884), which the majority quotes approvingly, at p. 746, the Supreme Court carefully analyzed why a released value did not contravene the common law prohibition against limitations on a carrier's liability, (at p. 746).

> The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. the shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value.

Hart v. Pennsylvania R.R. Co., 112 U.S. at 340-41, 5 S.Ct. at 155-56.

The majority interprets this analysis of released value limitations to authorize deductibles because there is no "qualitative" difference between them "in principle". However, the following sentence-by-sentence breakdown of the Supreme Court's analysis demonstrates that a deductible is not the same as a released value, "in principle" or otherwise:

Released Value	Deductible
(As described in *Hart*, 112 U.S. at 340-41 [5 S. Ct. at 155-56].)	
"The limitation as to value has no tendency to exempt from liability for negligence."	A deductible is designed to exempt from liability for negligence.
"It does not induce want of care."	A deductible does induce want of care and even petty theft.
"It exacts from the carrier the measure of care due to the value agreed on."	A deductible exacts from the carrier no care up to the deductible amount.
"The carrier is bound to respond to that value for negligence."	Below the deductible value the carrier is exempt from its negligence.
"The compensation for carriage is based on that value."	The compensation for carriage is not directly related to the amount of a deductible.
"The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties in that contract."	A deductible is unrelated to the value of the articles.
"The carrier must respond for negligence up to that value."	The carrier is exempt from liability up to the deductible amount.

In short, because of the fundamental differences between them, deductibles cannot be permitted as simply another form of released value.

III

By enacting the Household Goods Act of 1980—which the majority has not mentioned, even though this case involves carriers of household goods—Congress demonstrated its concern for the problems faced by the relatively unsophisticated shipper of household goods. As noted by the house committee:

> [T]hese shippers usually move only once or twice in their lives and, consequently, lack thorough understanding of the industry and sufficient clout to negotiate with it. Their situation is made more vulnerable by the fact that the moves involve all of their personal possessions, which often are of a fragile nature.

H. Rep. No. 96-1372, *reprinted in* 1980 U.S. Code Cong. & Ad.News 4271, 4272. The committee further noted, that the household goods moving industry "is the single most frequent subject of consumer complaints to the Interstate Commerce Commission," *id.*, and that approximately half of those complaints relate to the loss or damage of goods—precisely the area where a deductible has its primary impact. In order better to protect consumer shippers of household goods, Congress authorized several new devices, including written binding estimates of charges, guaranteed pick-up and delivery times backed by penalties or per diem payments for delay, as well as provisions for informal dispute settlement programs to be established by carriers of

household goods for the purpose of resolving shipper disputes in a fair, expeditious, and inexpensive manner. The amendment also restructured the penalty provisions of the act relating to the transportation of household goods in order to "place new emphasis on the need for carriers to minimize shipper harm and to encourage compensation when harm does occur." *Id.* at 4285.

Thus, Congress demonstrated in 1980 a major change in its approach to the regulations of household goods carriers. It added several new protections for the consumer, but carefully balanced them by eliminating some unnecessary regulation of the carriers. The majority, however, ignores this change and by today's decision significantly skews Congress's carefully crafted program for protecting movers of household goods. By reaching back to 1916 to discover a latent intent to authorize deductibles, one that was neither expressed nor exercised in the ensuing sixty years, the majority undermines the legislature's newly enhanced concern for householders. As petitioners colorfully argue, because the particular tariff under review grants the carriers a "license to steal" from each householder up to the deductible amount, it thereby removes much of the added consumer protection that Congress sought to create.

The petition for review should be granted and the commission's order should be vacated.

APPENDIX B
INTERSTATE COMMERCE COMMISSION DECISION
RELEASED RATES DECISION NO. FF-303
INTERSTATE INTERNATIONAL, INC.
USED HOUSEHOLD GOODS

Decided: May 13, 1980 Served: May 20, 1980

Released Rates Application No. FF-451, filed by Interstate International, Inc., seeks to establish several levels of released commodity rates per Unit on used household goods as outlined below, between points in the States of Maryland, Virginia and Washington, DC, on the one hand and on the other, points in the United States (excluding Hawaii and Alaska). Publication is proposed to be made in the carrier's individual tariff.

WE FIND:

The Commission, in *Practices of Motor Common Carriers of Household Goods,* 95 MCC 138, 175, held that released rates on shipments of household goods are justified because they are comparatively highly susceptible to loss or dmage and because they have a wide range of value which makes the amount of any claim that might arise difficult to estimate. We also find that the concept of a deductible, such as that proposed in Plans B and C, is reasonable under the circumstances surrounding the transportation. In this regard, see *S.W. Sugar Co.* v. *River Terminals,* 360 U.S. 411, 417-418.

WE ORDER:

Interstate International, Inc., may establish and maintain in its individual tariff (or in its agent's tariff) and subsequent issues thereof, commodity rates on:

> *USED HOUSEHOLD GOODS* - Personal effects and property used in a dwelling when a part of the equipment or supply of such dwelling. (Does not include property moving from stores,

offices, museums, institutions, hospitals and other establishments)

between points in the States of Maryland, Virginia and Washington, DC, on the one hand, and on the other, points in the United States (excluding Hawaii and Alaska) to the extent it is authorized by this Commission to perform the considered transportation, subject to the following:

(a) As used in this tariff the terms "released value", "declared value" and "value declared by shipper" shall have the same meaning. "Unit" means 400 cubic feet of space in a carrier's vehicle.

(b) The carrier's maximum liability per shipment [except when excess liability is requested by shipper and provided by carrier under the provisions of paragraph (c) below] shall be (see example):

1) Plan A—$12,000.00 times the number of Units and fractions of Units shipped, as shown on the bill of lading.

2) Plan B—$4,000.00 times the number of Units and fractions of Units shipped, as shown on the bill of lading. shipper shall assume loss and/or damage equal to $25.00 times the number of Units and fractions of Units shipped.

3) Plan C—$1,600.00 times the number of Units and fractions of Units shipped as shown on the bill of lading. Shipper shall assume loss and/or damage equal to $50.00 times the number of Units and fractions of Units shipped.

(c) Excess liability — If the shipper desires Carrier's liability to exceed the limits in (b) above, carrier will provide excess liability coverage at a premium rate of $5.00 per $1000.00 of declared value in excess of the limits in (b) above, but only in increments of $1000.00 (see example).

EXAMPLE — If one article in one Unit of a six Unit shipment is damaged, and the shipper had selected Plan B, the carrier's maximum liability will be $24,000.00 or $4000.00 times six Units. The shipper's deductible under Plans B and C will be determined on the same basis. If, on the other hand, the shipper had selected a lump sum value of $100,000.00, the carrier's maximum liability would be the same as for one article.

It is important to note that the released value represents the carrier's *maximum* liability. Its *actual* liability must be determined from other factors not subject to the jurisdiction of the Interstate Commerce Commission, such as the current value of the lost or damaged articles, the cost of repair, the cost of replacement and/or depreciation.

(d) The shipper's liability amounts referred to in Plans B and C above will be deducted from the amount determined to be the carrier's *actual* liability.

(e) Released value (see Note) — The carrier's maximum liability for loss and/or damage to articles in this shipment shall be the released values in Plan A, B or C as selected by the shipper in writing on the bill of lading, or the lump sum value declared by the shipper, whichever is greater.

Shipper's declared value $_____

_____

Shipper signature Date

NOTICE: The shipper signing this bill of lading must insert in the space above, in his own handwriting, his declaration of the released value of the shipment, otherwise the shipment will be deemed released to a maximum value provided in the plan selected. (Shipper may not declare a lump sum value which is less than an amount calculated at $1600.00 per Unit. If this occurs, the released value will be deemed to be that amount).

Note — If the shipper fails to select a plan or declare a lump sum value as provided in the foregoing, the limitations on carrier liability provided in this order are void and of no force or effect.

The provisions of paragraphs (a) through (e) and the following notations shall be published in tariffs publishing released rates authorized in this decision.

> Rates based on released value have been authorized by the Interstate Commerce Commission in Released Rates Decision No. FF-303 of May 13, 1980, subject to complaint or suspension.

Charges may be made in rates established under authority of this decision, but the released values may not be changed or the excess value charges increased without specific authority from this Commission.

This decision does not authorize released rates on traffic originating in an adjacent foreign country and moving on a through bill of lading to a point in the United Staes.

Insofar as any relief sought is not specifically granted, it is denied.

The Commission does not hereby approve the lawfulness, except under 49 USC 10730, of any rate which may be filed under authority of this decision.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

By the Commission, Released Rates Board; Members Llewellyn, Killelea and Walker, at Washington, DC.

AGATHA L. MERGENOVICH
Secretary

APPENDIX C
INTERSTATE COMMERCE COMMISSION
DECISION
RELEASED RATES DECISION NO. FF—303
INTERSTATE INTERNATIONAL, INC.
USED HOUSEHOLD GOODS
Decided: August 5, 1980

In Released Rate Application No. FF-451, Interstate International, Inc., sought to establish several levels of released values based on "units" (400 cubic feet of space in the carrier's vehicle), subject to a $25 or $50 deductible. The Released Rates Board found this proposal acceptable in Released Rates Decision No. FF-303, served May 20, 1980. Timely filed petitions for Administrative Review were received from National Small Shipments Traffic Conference, Inc. in conjunction with the Drug and Toilet Preparation Traffic Conference, Inc. and from the Shippers National Freight Claim Council, Inc. A timely filed reply was received from Interstate International.

WE FIND:

The appropriateness of released rates on shipments of household goods has long been recognized by the Commission. Shippers are free to assess the relative merits of Interstate International's innovative method of rating vis-a-vis the competition in making their selection.

Petitioners attack the concept of a deductible as inappropriate mainly because it reduces a carrier's interest in the security of freight it transports. However, this is true of all released rates since their only purpose is to reduce a carrier's liability below the actual loss or damage sustained by a shipper. In return, of course, shippers receive the benefit of reduced rates. Consequently, we find that the sought authority to establish and maintain the involved rates has been justified.

WE ORDER:

The petitions are denied.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

By the Commission, Division 1, acting as an Appellate Division, Commissions Clapp, Gresham and Trantum.

AGATHA L. MERGENOVICH
Secetary

APPENDIX D

INTERSTATE COMMERCE COMMISSION

RELEASED RATES DECISION NO. FF-303

INTERSTATE INTERNAIONAL, INC.

USED HOUSEHOLD GOODS

Decided: September 18, 1980 Served: October 3, 1980

National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc., filed a joint petition for administrative review, under 49 CFR 1100.98(c), of Divison I's decision, served August 18, 1980. There were no replies.

The Division denied an appeal by petitioners and the Shippers Natinal Freight Claim Council, Inc., of the decision of the Released Rates Board served May 20, 1980. The Board had found certain released rates and deductible provisions on household goods lawful under 49 U.S.C. 10730. It reasoned that household goods are comparatively susceptible to loss or damage and have a wide range of value which makes the amount of any claim that might arise difficult to estimate. The Division, in affirming the Board, also found that the concept of a deductible, such as that proposed in Plans B and C, is reasonable under the circumstances surrounding the transportation. It is this deductible that petitioners principally object to. They characterize it as an unlawful disclaimer of liability.

Petitioners contend that this issue is of general transportation importance and seek reconsideration and reversal of the prior decision.

Petitioners' arguments are unpersuasive. We do not believe that this is a matter of general transportation importance.

IT IS ORDERED:

The petition for further administrative review is denied.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis and Gilliam. Vice Chairman Gresham did not participate.

AGATHA L. MERGENOVICH
Secretary

APPENDIX E
INTERSTATE COMMERCE COMMISSION
DECISION
No. 38752
PETITION FOR DECLARATORY ORDER ON DEDUCTIBLES IN HOUSEHOLD GOODS RELEASED RATES

Decided: March 17, 1982 Served: March 23, 1982

By petition filed December 9, 1981, Shippers National Freight Claim Council, Inc., National Small shipments Traffic Conference, Inc., and Drug & Toilet Preparation Traffic Conference, Inc. (petitioners) request a declaratory order as to the proper interpretation of 49 U.S.C. 10730. Petitioners argue that 49 U.S.C. 10730 permits deductibles in agreements between shippers and railroads, but not between shippers and other modes of carriage.

The basis of this controversy was the Commission's action in *Released Rates Decision No. FF-303* (not printed), served May 20, 1980. There, our Released Rates Board approved an application by motor carriers to publish three levels of released rates on household goods, two of which were subject to deductibles. The decision was challenged by petitioners, but affirmed by Division 1 on the grounds that the rates were reasonable in the circumstances presented, as shippers could select released *rates* with or without a deductible. After a petition for further administrative review was denied by the entire Commission on October 3, 1980, petitioners sought judicial review *sub nom., Shippers National Freight Claim Council Inc., et al.* v. *I.C.C.*, Nos. 80-4242 and 80-4243 (2nd Cir., filed December 3, 1980). The court proceedings were subsequently ordered held in abeyance until March 1982, in order to enable petitioners to seek legislative changes or a declaratory order from the Commission. In response petitioners filed the subject declaratory order petition.

Under Section 554(e) of the Administrative Procedure

Act, we have discretion whether or not to institute a declaratory order proceeding. In view of the pending litigation, we will exercise this discretion and grant the petition. We need take no additional argument or evidence, however, since it seems clear that the interpretation petitioners seek simply will not lie. This conclusion follows from an analysis of the statutory provisions in issue.

As pertinent, Section 10730 provides:

> (a) The Interstate Commerce Commission may require or authorize a carrier (including a motor common carrier of household goods but excluding any other motor common carrier of property and excluding rail carrier) providing transportation or service subject to its jurisdiction...to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation...
> (b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission...may, subject to the provisions of this chapter...establish rates for the transportation of property (other than household goods) under which the liability of the carrier for such property is limited to a value established by a written declaration of the shipper or by written agreement between the carrier and shipper if that would be reasonable under the circumstances surrounding the transportation.
> (2) Before a carrier may establish a rate for any service under paragraph (1) of this subsection, the Commission may require such carriers to have in effect and keep in effect, during any period such

rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier.

(c) A rail carrier providing transportation or service subject to the jurisdiction of the Commission...may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement by the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property.

Petitioners argue that, because Section 10730(c) is specific in allowing rail carriers to provide for deductibles while Sections 10730(a) and (b) are silent as to deductibles, the Commission is without jurisdiction to permit carriers of household goods and other motor carriers to establish deductibles. We do not agree.

An express authorization contained in one section of a statute does not imply pervasive prohibitions in other sections. See *American Trucking Association* v. *Atchison T. & S.F. R.R.*, 387 U.S. 397, 411 (1967). Nor can a prohibition against deductibles be read into the language of Subsections 10730(a) and (b). Subsection (a) gives the Commission broad discretion to require or authorize household goods rates under which the carrier's liability is limited to a value established by written declaration of a shipper, when that value would be reasonable under the circumstances surrounding the transportation. Broad discretion is also given the Commission to determine what is reasonable in each circumstance. Discussing the released value provision of 49 U.S.C. 20(11), the predecessor of Section 10730, a court has held that "the Commission has discretion...to authorize any form of released vlaue

provision, so long as it finds the rates that are based on that provision to be just and reasonable under the circumstances and conditions surrounding the transportation." *National Motor Freight Traffic Ass'n, Inc.* v. *I.C.C.*, 590 F.2d 1180, 1185 (D.C. Cir. 1975). Moreover, there is no legitimate reason to distinguish, as petitioners attempt, between released rates and deductibles. Both have similar effects on carrier liability, although each limits it in a somewhat different fashion.

Accordingly, we conclude that Section 10730(a) does not limit the kind of value limitation the Commission may approve. We also note that this reasoning is consistent with the policy of the Household Goods Transportation Act of 1980, which declares that maximum flexibility on the part of the carriers in the pricing of their services best serves the shippers of household goods and allows a variety of quality and price options to meet market demands. (See Section 2(a)(3).) The same reasoning applies equally to Section 10730(b). No ban against deductibles is supported by the statutory language of that section.

We find:

The statutory language of 49 U.S.C. 10730 permits deductibles for released rates by written declaration of the shipper or by written agreement between shippers and motor common carriers of household goods, between shippers and rail carriers.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The petition is granted.

This proceeding is discontinued.

By the Commission, Divison 2, Commissioners Gresham, Gilliam, and Taylor. Commissioner Taylor is assigned to this Division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH
Secretary

APPENDIX F
REISSUED

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of December one thousand nine hundred and eighty-three.

SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC.
NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, No. 80-4243

Respondents,

AMERICAN TRUCKING ASSOCIATION, INC.,

Interevening Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioners, Shippers Freight Claim Council, Inc., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested

that a vote be taken theron.
A. Daniel Fusaro, Clerk

by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX G

49 U.S.C. § 10730. Rates and liability based on value

(a) The Interstate Commerce Commission may require or authorize a carrier (including a motor common carrier of household goods but excluding any other motor common carrier of property and excluding any rail carrier) providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title, to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation. A rate may be made applicable under this section to livestock only if the livestock is valuable chiefly for breeding, racing, show purposes, or other special uses. A tariff filed with the Commission under subchapter IV of this chapter shall refer specifically to the action of the Commission under this section.

(b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may, subject to the provisions of this chapter (including the general tariff requirements of section 10762 of this title), establish rates for the transportation of property (other than household goods) under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(2) Before a carrier may establish a rate for any service under paragraph (1) of this subsection, the Commission may require such carrier to have in effect and keep in effect, during any period such rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier.

(c) A rail carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property.

49 U.S.C. § 20(11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory of the District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common

carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, nothwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by the under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no

other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission pursuant to such order contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claimor any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the linehaul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.